

BRB No. 12-0148 BLA

ETHEL COLLINS )  
(Surviving Spouse of LANDON H. )  
COLLINS) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
KENTLAND-ELKHORN COAL ) DATE ISSUED: 02/27/2013  
COMPANY )  
 )  
and )  
 )  
PITTSOON COMPANY )  
 )  
Employer/Carrier- )  
Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2009-BLA-05188) of Administrative Law Judge Lystra A. Harris, rendered on a survivor's claim filed on January 23, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The administrative law judge determined that the miner worked at least nineteen years in underground coal mine employment and further found that claimant established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4), 30 U.S.C. §921(c)(4).<sup>2</sup> The administrative law judge further found that employer failed to rebut that presumption by proving either that the miner did not have pneumoconiosis or that his death did not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits, commencing as of May 2006, the month in which the miner died.

On appeal, employer asserts that the retroactive application of amended Section 411(c)(4) to this claim is unconstitutional. Employer also requests that the Board hold this case in abeyance.<sup>3</sup> Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the award of benefits.

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<sup>1</sup> Claimant is the widow of the miner, who died on May 15, 2006. Director's Exhibit 12.

<sup>2</sup> On March 23, 2010, Congress adopted amendments to the Black Lung Benefits Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Relevant to this survivor's claim, amended Section 411(c)(4) provides that claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if she establishes that the miner worked fifteen or more years in underground or substantially similar coal mine employment, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

<sup>3</sup> Employer's request to hold this case in abeyance, pending resolution of the legal challenges to the PPACA, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of amended Section 411(c)(4) to this survivor's claim results in a violation of employer's right to due process and also constitutes an unlawful taking of private property under the Fifth Amendment of the United States Constitution. However, subsequent to the filing of employer's brief in this case, the United States Court of Appeals for the Sixth Circuit specifically rejected similar constitutional challenges in *Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013). We therefore reject employer's arguments in this appeal for the reasons set forth in *Groves. Id.*; see *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); see also *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011).

Furthermore, we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4), and that employer did not establish rebuttal of that presumption. Decision and Order at 12, 18-19; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because employer raises no other legal issues, nor any substantive challenge to the administrative law judge's finding regarding the survivor's entitlement to benefits, we affirm the award of benefits. See *Skrack*, 6 BLR at 1-711.

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<sup>4</sup> The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge